BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of	)
	)
ROBERT W. RITCHIE	)

For Appellant:	Phillip D. Reed Attorney at Law
For Respondent:	James C. Stewart Counsel

O P I N I O N

This appeal is made pursuant to section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Robert W. Ritchie against a proposed assessment of additional personal income tax in the amount of $861.52 for the year 1976.

The issue for determination is whether appellant is entitled to a casualty loss deduction for 1976.

In 1962 or 1963 appellant inherited from his father a five-acre parcel of mountain property, Within the boundaries of the parcel, which boundaries had been maintained by the appellant and his father for over 20 years, were located a cabin and a well. In 1972,. the appellant and some surrounding land owners decided to have a formal land survey made of all property boundaries in the area. The survey report indicated to appellant's surprise that the cabin and well were not located on his land. The well and cabin were located on the land of appellant's neighbors.

Communications transpired between appellant and his neighbors whereby he was requested in 1972 and 1973 to remove his possessions, including the cabin, from their land. Appellant was, in the meantime, allowed reasonable use of the well and granted access over the neighbors' land since appellant's parcel was otherwise landlocked under the new survey. Appellant did not remove the cabin,. and in 1976, appellant's neighbors claimed the portion of land containing the cabin and well, dispossessing appellant thereof. The access privilege and the right to use the well were. also revoked.

In his personal income tax return for 1976, appellant claimed a casualty loss deduction of $7,832.00. The amount of the claimed loss includes his estimated cost for a new well ($3,000) and a new cabin ($4,932), less the $100.00 statutory exclusion, (See below.) Respondent determined that the claimed loss was not a deductible casualty loss. Consequently, respondent disallowed the deduction and issued a proposed assessment of additional tax. Appellant protested. After a hearing, respondent affirmed the proposed assessment. Appellant appeals from that action.

Section 17206 of the Revenue and Taxation Code, which is substantially similar to section 165, subd. (c)(3), of the Internal Revenue Code, states in relevant part as follows:

> (a) There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.
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> * * *
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> (c) In the case of an individual, the deduction under subsection (a) shall be limited to --
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> * * *
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> (3) Losses of property not connected with a trade or business, if such losses arise from fire, storm, shipwreck, or other casualty, or from theft. A loss described in this paragraph shall be allowed only to the extent that the amount of loss to such individual arising from each casualty; or from each theft, exceeds one hundred dollars ($100). ... (Emphasis added.)

With respect to a claimed casualty loss deduction, the burden is upon the taxpayer to substantiate the claim. He must prove that he suffered a loss in the taxable year in question as a result of a casualty and the amount of the loss. (Welch v. Helvering, 290 U.S. 111 [78 L. Ed. 212] (1933); David Axelrod, 56 T.C. 248; Appeal of Jack Caplan, Cal. St. Bd. of Equal., June 28, 1977.) In our view appellant has failed in all respects to meet this burden.

Appellant has claimed that he suffered a loss as a result of a deductible casualty. He states that the dictionary meaning of casualty applies in this case, and that the event which caused his claimed loss fits within such definition. We disagree.

The term "'or other casualty, " as it appears in section 17206, has a specialized meaning, It is well established that under the doctrine of ejusdem generis -- of the same class -- casualty in this context refers to a casualty of the same general nature or kind as a fire, storm or shipwreck. (A. Gilbert Formel, ¶ 50,221 P-H Memo. T. C. (1950); J. Hughes, 1 B.T.A. 944; Richard A. Hill, ¶ 78,098 P-H Memo. T.C. (1978); Daniel F. Ebbert, 9 B.T. A. 1402.) Casualty, in this sense, connotes the effect of some sudden and destructive force resulting in loss.

(Edgar F. Stevens, ¶ 47,191 P-H Memo. T. C. (1947): see also Shearer v. Anderson, 16 F. 2d 995 (2nd Cir. 1927): United States v. Rogers, 120 F. 2d 244 (9th Cir. 1941): John P. White, 48 T. C. 430.) A loss resulting from an event not like a fire, storm or shipwreck is not one resulting from a "casualty. " (Fred J. Hughes, supra; William J. Powers, 36 T.C. 1191.)

Appellant's claimed loss, in contrast, came about as the result of his neighbors' lawful exercise of possessor-y rights to real property.. From the above, it is clear that such event is not a "casualty" within the meaning of Revenue and Taxation Code section 17206. Therefore, in our view, appellant suffered no Ioss as a result of a deductible "casualty, " and is therefore not entitled to the casualty loss he has claimed. Furthermore, appellant has not established the adjusted basis of the property he claims to have lost. Where the taxpayer does not prove basis it has consistently been held that his loss cannot be computed, (I. Hal Millsap, Jr. , 46 T.C. 751,) Lastly, we question whether it has been shown that the cabin and well were lost in 1976, rather than in 1972 when the land survey was conducted.

On the basis of all the above factors, it must be concluded that appellant has failed to show a deductible casualty loss in 1976. The respondent's action in denying the casualty loss deduction was proper..

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

Appeal of Robert W. Ritchie

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Robert W. Ritchie against a proposed assessment of additional personal income tax in the amount of $861.52 for the year 1976, be and the same is hereby sustained,

Done at Sacramento, California, this 1st day of August, 1980, by the State Board of Equalization.

_____, Chairman

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is purchased that the seller will be paid. Further events may alter the payment in some respects, but all events have occurred to fix the fact of the liability at the time of purchase. A thief, on the other hand, obtains property with no intention or expectation of paying the victim for it. (See Moore v. United States, 412 F.2d 974, 979-983 (5th Cir. 1960).) If the thief or the theft were never discovered, the thief's liability would never be established. In 1971, appellant's theft had not even been discovered. His liability at that time was contingent, and therefore not deductible.

The question of when appellant would be entitled to deduct reimbursement payments is not before us, so we do not address that issue.

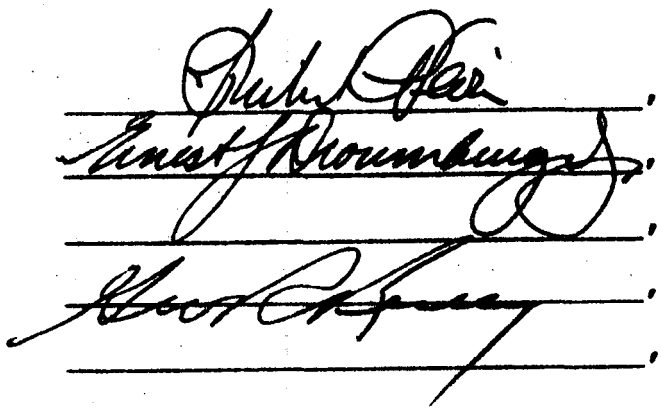
Appellant presents several other arguments in support of allowing the deduction in 1971, but we do not find any of them convincing. Therefore, we sustain respondent's action.

ORDER.

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Jerry N. Schneider against a proposed assessment of additional personal income tax is hereby modified to reflect the correct amount of $10,848.40 for the year 1971. In all other respects, the action of the Franchise Tax Board is hereby sustained.

Done at Sacramento, California, this 1st day Of August, 1980, by the State Board of Equalization.



, Chairman

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